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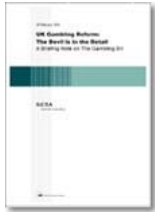
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Survey Techniques for Rigorous Measurement of Damages in Trade Dress Confusion Cases

8 January 2007

By Dr. Alan Cox and Louis Guth

The purpose of this paper is to describe Choice Modeling, a method for measuring the degree of confusion in trade dress infringement cases and for simultaneously measuring the size of any damages that may result. The method, which has been developed with contributions by NERA economists, provides a widely accepted, testable technique that has been peer reviewed, has known rates of error and which is often used in market research -- not merely in litigation. Under a Choice Modeling exercise, survey respondents compare the features of a product, including brand name, trade dress and price, and report their preferences for a particular combination of features. An example, described in the paper, will illustrate the concept.

Choice Modeling has at least two significant advantages over conventional surveys. First, since Choice Modeling is derived from a well-formulated theory of consumer behavior, results can be translated into monetary values, not merely reports of the percentage of respondents indicating that they were confused. The effect of an allegedly confusing brand name or product trade dress is measured in terms of lost sales occurring at specific price levels, all else equal. Choice Modeling can also be used to make direct estimates of possible damages from decreased profit margins due to any price reductions required to maintain market share.

Second, Choice Modeling surveys reduce the amount of bias introduced by the interaction between the interviewer and the respondent. In fact, no interviewer or respondent could possibly guess the significance of any answer or how a response relates to the final analysis.

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